UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

VCAN BIO USA CO., LTD.

Plaintiff,

v.

KIRSTJEN M. NIELSEN, Secretary, U.S. Department of Homeland Security; U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGRATION SERVICES; and LAURA B. ZUCHOWKSI, Director, USCIS Vermont Service Center

Defendants.

Civil Action No. _____

COMPLAINT FOR REVIEW OF AGENCY ACTION UNDER THE ADMINISTRATIVE PROCEDURE ACT

Plaintiff Vcan Bio USA Co., Ltd. ("Vcan"), by and through undersigned counsel, complains of the Defendants as follows:

NATURE OF THE ACTION

Vcan seeks judicial review of final agency action denying two petitions for nonimmigrant "H-1B" status filed by Vcan on behalf of two highly skilled and educated foreign nationals. Vcan, located in Natick, Massachusetts, is the fast-growing U.S. subsidiary of a successful and well-known Chinese biotech company. In April 2018, Vcan filed two petitions with the Defendant U.S. Citizenship and Immigration Services on behalf of Junhua Wu and Jia Yan Hao which sought to sponsor them for nonimmigrant "H-1B" status (hereinafter the "H-1B petitions") and thereafter employ them in the United States in the position of Financial Analyst. The H-1B classification allows highly skilled and educated foreign workers to work for U.S. employers in "specialty

occupations" or positions which require the theoretical and practical application of a body of highly specialized knowledge, for which a bachelor's or higher degree in a specific specialty is required. The H-1B petitions were denied on the sole ground that Vcan's Financial Analyst position did not qualify as a specialty occupation. The denial constitutes arbitrary and capricious agency action which cannot be sustained on appeal, either as an abuse of discretion or under a *de novo* standard of review. Vcan seeks a Court order vacating the Defendants' denials of the H-1B petitions, remanding to the Defendants with instructions to approve the H-1B petitions immediately.

PARTIES

1. Plaintiff, Vcan, is a Delaware corporation with a principal place of business at 21 Strathmore Road, Natick, Massachusetts 01760.

2. Defendants, Department of Homeland Security ("DHS") and U.S. Citizenship and Immigration Services ("USCIS"), are the agencies responsible for enforcing the Immigration and Nationality Act (INA) and for adjudicating and approving petitions for nonimmigrant visas and providing foreign nationals with evidence of their legal status in the United States.

3. Defendant, Kirstjen M. Nielsen, is being sued in her official capacity as the Secretary of DHS. In this capacity, she is charged with the administration and enforcement of the immigration laws, pursuant to 8 U.S.C. § 1103, and she possesses extensive discretionary powers to grant certain relief to non-U.S. citizens. More specifically, the Secretary is responsible for enforcing the INA, approving petitions for nonimmigrant visas, and providing foreign nationals with evidence of their legal status in the United States. Defendant USCIS is an agency within Defendant DHS to whom the Secretary's authority has in part been delegated, and is subject to the Secretary's supervision.

4. Defendant Laura B. Zuchowksi ("Zuchowski") is sued in her official capacity as the Director of the USCIS Vermont Service Center. Zuchowski's facsimile signature is affixed to the request for evidence and denial notices received by Vcan in connection with its H-1B petitions. The Vermont Service Center has jurisdiction over all H-1B petitions filed for specialty occupations located within Massachusetts and, in fact, is the facility where Vcan's H-1B petitions were adjudicated and where the files may currently be located. The Vermont Service Center is located at 75 Lower Welden Street, St. Albans, Vermont 05470.

JURISDICTION AND VENUE

5. This case arises under the INA, 8 U.S.C. § 1101 *et seq.* and the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq*. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction). This Court also has the authority to grant declaratory relief under 28 U.S.C. §§ 2201-02, and injunctive relief under the APA. The United States has waived its sovereign immunity under 5 U.S.C. § 702.

6. Venue in this judicial district is proper under 28 U.S.C. § 1391(e)(1)(C), because this is a civil action against officers and agencies of the United States in their official capacities, brought in the judicial district where Vcan resides and where a substantial part of the events or omissions giving rise to Vcan's claims occurred. Vcan's H-1B petitions were decided by the Vermont Service Center, which has jurisdiction over visa petitions filed by Massachusetts employers.

7. The Defendants' decisions to deny Vcan's H-1B petitions for its intended beneficiaries, Jia Yan Hao and Junhua Wu, constitute final agency action under the APA, 5 U.S.C. § 701 *et seq.* Neither the INA nor implementing regulations at 8 C.F.R. § 103.3.(a) require an

administrative appeal of the denial. Accordingly, Plaintiff has no administrative remedies to exhaust.

LEGAL BACKGROUND

H-1B Petition Process

8. The H-1B program allows U.S. employers to temporarily hire foreign nationals to work in a "specialty occupation" for a maximum period of six (6) years, plus additional extensions as permitted by law. *See* INA § 101(a)(15)(H)(i)(b); 8 U.S.C. § 1184(g)(4); and § 104(c), American Competitiveness in the Twenty-First Century Act (AC21), Title 1, § 104(c), Pub. L. 106-313 (Oct. 17, 2000).

9. A U.S. employer successfully obtains nonimmigrant "H-1B" status for its employees or prospective employees through a two-step process. First, the petitioning employer must file a Labor Condition Application ("LCA") with the U.S. Department of Labor ("DOL"). 8 U.S.C. § 1182(n)(1). The employer makes certain attestations in the LCA, which are intended to ensure that the employment of an H-1B worker will not have an adverse effect on the wages and working conditions of similarly-situated U.S. workers. *See* 8 U.S.C. §§ 1182(n)(1)(A)-(D).

10. In preparing the LCA, the employer also must identify the Standard Occupational Classification ("SOC") code and the corresponding occupational classification for its job.[1] For the Financial Analyst job proffered to Junhua Wu and Jia Yan Hao, Vcan identified SOC Code 13-2051, which is the occupational classification for financial analysts. The employer uses wage data associated with the SOC code to provide data to DOL relevant to both the wage it will pay the

[1] The SOC codes are derived from the "Occupational Information Network" (O*NET), which a state agency has developed and maintained under a DOL grant. *See* https://www.onetonline.org. The O*Net database is based on the SOCs and described on its website as "containing hundreds of standardized and occupation-specific descriptors on almost 1,000 occupations covering the entire U.S. economy."

foreign national in the "specialty occupation" and the prevailing wage for the occupation in the area of intended employment depending on the employer's education and experience requirements. In the case of both H-1B petitions, Vcan selected a Wage One Level for SOC Code 13-2051.

11. Second, and upon certification of the LCA by DOL, the employer must file an H-1B petition with USCIS. Each H-1B petition is accompanied by the certified LCA that corresponds with the sponsored petition. If the foreign national is in the United States in another valid nonimmigrant status, such as a F-1 student, at the time the petition is filed with USCIS, the employer may request a change of nonimmigrant status to H-1B.

H-1B Requirements

12. To adjudicate an H-1B petition, USCIS must ultimately determine whether the U.S. employer's job qualifies as a "specialty occupation" and whether the beneficiary is qualified to perform the job duties required by the specialty occupation. *See* 8 C.F.R. §§ 214.2(h)(4)(i)(A)(1), (h)(4)(iii)(B)(3).

13. A "specialty occupation" is one that requires "(A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C. § 1184(i).

14. Regulations further refine the statutory definition as follows:

> (A) Standards for specialty occupation position. To qualify as a specialty occupation, the position must meet ***one*** of the following criteria:
>
> (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> (2) The degree requirement is common to the industry in parallel positions among similar organizations, or, in the alternative, an employer may show

> that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> (3) The employer normally requires a degree or its equivalent for the position; ***or***
>
> (4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A)(1) - (4) (emphasis added).

15. In assessing whether a position meets the first criterion, i.e., that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position, USCIS adjudicators routinely consult the Occupational Outlook Handbook (OOH). USCIS recognizes the OOH as an authoritative source on the duties and educational requirements of certain occupations. The OOH is a DOL reference manual, updated every two years, which provides profiles about hundreds of occupations that represent a majority of the jobs in the United States. The occupational profiles describe, among other details, the typical education and training needed to enter the occupation.

16. By regulation, USCIS invites U.S. employers to submit evidence "that the services the beneficiary is to perform are in a specialty occupation [including]: …(2) affidavits or declarations made under penalty of perjury submitted by… recognized authorities certifying to the recognition and expertise of the beneficiary…." 8 C.F.R. § 214.2(h)(4)(iv)(A).

17. USCIS adjudicates H-1B petitions under the "preponderance of the evidence" standard. To satisfy their burden, U.S. employers must show that it is "more likely than not" a claim is true based upon "relevant, probative and credible evidence." *See Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010); USCIS Adjudicator's Field Manual (AFM), ch. 11.1(c); *see generally* 8 U.S.C. § 1361.

FACTUAL ALLEGATIONS

Vcan Bio

18. Vcan is a subsidiary of VcanBio Cell & Gene Engineering Corporation, Ltd. ("Vcan Bio China"). Publicly traded on the Shanghai Stock Exchange, Vcan Bio China is one of China's most successful and well-known biotech companies focusing on cell therapy, precision medicine, and related fields. It possesses one of the largest cord blood banks in the world, with over 300,000 cord blood units, and has dozens of subsidiaries in China.

19. In 2016, Vcan Bio China established two subsidiaries in the United States, Vcan and VcanBio Center for Translational Biotechnology ("CTB"), to expend operations in North America.

20. CTB directly fosters the advance of promising biologics, treatments, and new therapies through partnerships and co-development. CTB locates and provides infrastructure, expertise, and resources to identify innovative projects and programs. It also performs tests and offers support for preclinical investigation, clinical trial submission, and trial implementation. Vcan operates on a different model. It develops investment strategies in the biotech industry which include collaboration with universities to sponsor research; invest in start-ups, joint ventures, and other companies at various stages of their growth through a combination of private equity and debt; mergers and acquisitions; and licensing agreements. Vcan relies heavily upon its staff's sophistication in the life sciences/biotechnology sector and their understanding of financial data, regulatory developments, and market trends and forecasts to analyze, formulate, and execute upon these investment strategies. Among its recent endeavors, Vcan has invested directly or indirectly in several biotechnologies and products, including oncology cancer drug discovery, genome diagnostic products and innovative treatments of liver cancer and acute myeloid leukemia.

H-1B Petition for Junhua Wu

21. Mr. Wu is a highly-educated native of China. He first came to the United States in 2008 on a student F-1 visa to attend high school. He holds a four-year Bachelor of Science degree in Hotel and Restaurant Administration from Cornell University. During the adjudication of the H-1B petition, Mr. Wu was in the process of pursuing a Master of Professional Studies degree in Applied Economics and Management from Cornell University. The combination of Mr. Wu's Bachelor's degree and his Master's degree coursework in the specific specialty of Finance, completed prior to the filing of the H-1B on Mr. Wu's behalf, is the equivalent of a Bachelor's degree in Finance. *See infra* at ¶ 28.

22. On April 12, 2018, Vcan filed an H-1B petition for the benefit of Mr. Wu. In support of the H-1B petition, Vcan included, among other evidence, a letter describing Vcan, a detailed description of the Financial Analyst job duties; the education, experience, and skill sets needed to perform the job, as well as educational transcripts demonstrating Mr. Wu's qualification for the Financial Analyst position.

23. On August 27, 2018, USCIS issued a request for evidence ("RFE") entitled "*STUDENT* REQUEST FOR EVIDENCE" which sought additional information establishing that the Financial Analyst position qualified as a "specialty occupation." USCIS claimed that the evidence Vcan submitted was insufficient to meet any one of the four regulatory criteria for a "specialty occupation." Notwithstanding the submitted educational transcripts, USCIS also claimed in the RFE that Mr. Wu did not qualify for the Financial Analyst position because he did not hold a U.S. bachelor's or higher degree "with a specialization in finance."

24. In its RFE response, filed on November 15, 2018, Vcan submitted additional evidence that the Financial Analyst position fell within the definition of a specialty occupation,

pursuant to each of the following: 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) (a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position); (A)(3)(the employer normally requires a degree or its equivalent for the position); and (A)(4) (the nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree). Satisfaction of any one of these three criterion, compels the conclusion that the Financial Analyst position is a "specialty occupation" under the regulations.

25. Included within Vcan's nine-page letter responding to the RFE was a detailed description of the Financial Analyst's job duties and correlation of those duties to the coursework Mr. Wu completed, thus providing the educational foundation necessary for performance of each duty. (*See* Exhibit A and B, October 30, 2018 Vcan RFE response letters, at 2-10).[2]

26. Vcan also submitted evidence showing that it normally requires a Bachelor's degree in the specialty fields of accounting, finance, business administration (finance), or related. A current job description for the Financial Analyst position indicated that the education requirements for the job were a Bachelor's degree in "finance, accounting, business, or applied economics, or business administration or a related field…" **and** specialized studies in finance, including "…at least 18 credit hours of college coursework in finance or macro/micro economics, business management, business analytics or investment analysis, financial management, financial modeling, financial accounting, managerial accounting, corporate financial, private equity, investment banking or similar courses." Further, Vcan referenced the other H-1B petition to show that, despite the fact that the position was new within its organization, it normally required a Bachelor's in the specified fields.

[2] These documents and USCIS' denials, attached *infra* at Ex. C and D, contain redactions of personally identifiable information.

27. Vcan further submitted evidence showing that a Bachelor's degree in the specified fields is normally the minimum requirement for entry into financial analyst positions. Such evidence included the OOH which described the educational requirements for the position as follows: "[t]ypical Entry-Level Education: Bachelor's degree," "[f]inancial analysts typically must have a bachelor's degree," and "[m]ost [financial analyst] positions require a bachelor's degree. A number of fields of study provide appropriate preparation, including accounting, economics, finance, statistics, and mathematics."

28. Vcan substantiated its RFE response by submitting expert letters from recognized authorities[3], Dr. Richard W. Sapp and Dr. Kashi R. Balachandran, pertaining to both the complexity of the job duties associated with the proffered Financial Analyst position and Mr. Wu's attainment of the equivalent of a Bachelor's degree in the field of finance.

H-1B Petition for Jia Yan Hao

29. Mr. Hao is also a highly-educated native of China. He first came to the United States in 2013 on a student F-1 visa. He graduated from Boston University *cum laude* and was awarded a four-year Bachelor of Science degree in Business Administration, with a concentration in finance. Mr. Hao also holds a Master of Science degree in Applied Analytics from Columbia University.

30. On April 12, 2018, Vcan filed an H-1B petition for the benefit of Mr. Hao. In support of the H-1B petition, Vcan included, among other evidence, a letter describing Vcan; a detailed description of the Financial Analyst job duties; the education, experience, and skill sets needed to perform the job, and Mr. Hao's qualifications.

[3] Defendants did not dispute that the Sapp and Balachandran letters conform to the "General documentary requirements for H-1B classification in a specialty occupation," including "recognized authorities certifying as to the recognition and expertise of the beneficiary." 8 C.F.R. § 214.2(h)(4)(iv)(A).

31. USCIS issued a request for evidence ("RFE") entitled "*STUDENT* REQUEST FOR EVIDENCE" on August 27, 2018 which sought additional information establishing that the Financial Analyst position qualified as a "specialty occupation." USCIS claimed that the evidence Vcan submitted was insufficient to meet any one of the four regulatory criteria for a "specialty occupation." USCIS did not, as it had in the case of the H-1B petition benefitting Mr. Wu, question Mr. Hao's qualification for the proffered Financial Analyst position.

32. In its RFE response, filed on November 15, 2018, Vcan submitted substantially the same evidence as that submitted in response to the RFE for the H-1B petition benefitting Mr. Wu, including evidence that the Financial Analyst position fell within the definition of a specialty occupation pursuant to each of the following: 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) (a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position); (A)(3)(the employer normally requires a degree or its equivalent for the position); and (A)(4) (the nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree). Again, satisfaction of any one of these three criterion, compels the conclusion that the Financial Analyst position is a "specialty occupation" under the regulations.

33. Because USCIS did not question Mr. Hao's qualification for the Financial Analyst position, Vcan submitted an expert letters from Dr. Sapp pertaining to the complexity of the job duties associated with the proffered Financial Analyst position.

USCIS' Denies the H-1B Petitions

34. USCIS denied each of Vcan's H-1B petitions on December 11, 2018. The denial notices are virtually identical (in fact, all but a few words of the notices are exactly the same). The notices acknowledged that the proffered position fell within the financial analyst occupation as

listed in the OOH but found that it was not a specialty occupation. The decision is unintelligible in parts; makes fundamental factual errors, notwithstanding abundant record evidence regarding these facts; and constitutes arbitrary and capricious agency action which cannot be sustained on appeal.

35. By way of example, the denial notices stated that:

> The OOH does not appear to indicate that Financial Analyst positions normally require a minimum of a bachelor's degree in a specific specialty. A range of educational credentials may qualify an individual to perform the duties of a Financial Analyst.

(Exhibits C and D, USCIS denials of H-1B petitions, at 5). Contrary to this conclusion, the OOH clearly indicates that a bachelor's degree is the "typical" entry-level degree for financial analyst positions and that "***[m]ost*** [financial analyst] positions require a bachelor's degree. A number of fields of study provide appropriate preparation, including accounting, economics, finance, statistics, and mathematics." (emphasis added). USCIS's conclusion is irreconcilable with the clear language of the OOH.

36. USCIS also concluded that that neither of the H-1B petitions "established how the qualifying field of study directly related to the duties and responsibilities of the [Financial Analyst] position." (Exhibits C and D, USCIS denials of H-1B petitions, at 5-6, 8). However, the RFE responses included both employer letters and expert letters from recognized authorities pertaining to this exact issue—evidence which USCIS did not object toand only briefly gave reference to. *See*, *supra*, at ¶¶ 25, 28, 32-33.

37. Finally, USCIS selectively quoted from a single document, Vcan's job announcement, to insist that a degree in a general-purpose degree in business was all that Vcan required for the proffered Financial Analyst position. (*See* Exhibits C and D, USCIS denials of H-1B petitions, at 4). That is plainly not the case, as the job announcement required coursework in

the specific specialties relating to finance. *See, supra*, at ¶ 29. In addition, USCIS' myopic adjudication clearly ignored other evidence establishing that a general-purpose degree would not, by itself, satisfy the job requirements for Vcan's Financial Analyst position. *See, supra*, at ¶¶ 25, 28, 32-33.

38. Premised upon these clear factual errors and unintelligible conclusions, USCIS's adjudication of the H-1B petitions constitutes reversible error.

39. With respect to the first regulatory criterion, 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1), USCIS explicitly consulted with and relied upon the OOH. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 146 (1st Cir. 2007). However, USCIS abused its discretion when it determined that the OOH did not indicate the proffer Financial Analyst position normally requires a bachelor's degree in a specific specialty. To the contrary, the OOH identified a number of specific—not general-purpose—Bachelor's degree programs which "most" financial analysts must possess. *See Chung Song Ja Corp. v. U.S. Citizenship & Immigration Servs.*, 96 F. Supp. 3d 1191, 1198 (W.D. Wash. 2015) (determining that "Defendant's approach impermissibly narrows the plain language of the statute" which does not "restrict qualifying occupations to those for which there exists a single, specifically tailored and titled degree program."); *accord Tapis Intern. V. INS*, 94 F.Supp.2d 172, 176 (D. Mass. 2000). USCIS makes no assertion that the job proffered by Vcan to Mr. Wu and Mr. Hao is classifiable under any SOC other than that of financial analyst. Thus, Defendants' arbitrary and capricious fact-finding with regard to the normal requirements of the proffered position constitutes reversible error.

40. As to the third regulatory criterion, 8 C.F.R. § 214.2 (h)(4)(iii)(A)(3) (requiring a showing that the employer normally requires a degree or its equivalent), USCIS' unreasonable interpretation of its own regulation is not entitled to deference. By indicating that it cannot accept

evidence of Vcan's normal practice as sufficient—notwithstanding the plain language of the regulation—USCIS effectively rendered the criterion meaningless. (Exhibits C and D, USCIS denials of H-1B petitions, at 8) ("If USCIS was limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any obligation so long as the employer required the individual to have a baccalaureate or higher degree.").

41. Additionally, USCIS misstates the facts, claiming that Vcan does not normally require a Bachelor's degree in a specific specialty for the proffered position. Such a conclusion is in clear contravention to record because, as USCIS acknowledges, the H-1B petitions are Vcan's "first time hiring for this [Financial Analyst] position within your organization." (Exhibits C and D, USCIS denials of H-1B petitions, at 8). Because each of Mr. Wu and Mr. Hao clearly possess a Bachelor's degree with concentrations in the specifics specialties required by Vcan, , *see supra* at ¶¶ 21, 28, 29, 36-37, Defendants' unreasonable interpretation of its regulations is not entitled to any deference, and its arbitrary and capricious fact-finding cannot be sustained on appeal.

42. As to the fourth regulatory criterion—that the nature of the specific duties are so specialized and complex that the knowledge required to perform the duties is usually associated with attaining a bachelor's or higher degree, 8 C.F.R. § 214.2 (h)(4)(iii)(A)(4)[4]—Defendants' arbitrarily and capriciously ignored Vcan's specific evidence explaining how the duties of the proffered Financial Analyst position necessitated knowledge associated with a Bachelor's degree in specific specialties relating to finance. For example, while USCIS acknowledged their receipt of the Sapp letter, they virtually ignored its content and seized upon a single sentence in the five-

[4] It appears that USCIS has conflated or compressed the second "specialty occupation" criterion—that the particular position is so complex and unique that it can only be performed by an individual with a degree, 8 C.F.R. § 214.2 (h)(4)(iii)(A)(4)—with the fourth criterion. This compression is an unsustainable abuse of USCIS's discretion as it renders the fourth criterion essentially meaningless.

page document to deny the H-1B petition. (*see* Exhibits C and D, USCIS denials of H-1B petitions, at 6-7)

43. Even more egregious, USCIS simply ignored Vcan's nine-page letter submitted in response to the RFEs, which further distilled the job duties of the position and explained the necessity of theoretical knowledge associated with finance-related specialties to perform those job duties. Defendants' selective reading of the record is arbitrary and capricious and constitutes reversible error.

44. Further, because USCIS did not dispute the content of either the Sapp letter or Vcan's RFE response letter, its reliance upon the LCA wage levels to deny the H-1B petitions constitutes an abuse of discretion. For the purposes of the fourth regulatory criterion, the inquiry rests not upon the complexity of the position in relation to other positions within the same occupation. Rather, the regulation criterion tests the complexity of the *job duties* themselves without reference to other comparable positions. Thus, the relational analysis employed by USCIS to leverage the wage levels over Vcan's evidence and use that analysis to justify denial of the H-1B petitions, is arbitrary and capricious.

45. Under 5 U.S.C. §§ 702 and 704, Vcan has suffered a "legal wrong" and has been "adversely affected or aggrieved" by agency action for which there is no adequate remedy at law.

Defendants Impermissibly Imposed a Heightened Burden of Proof Upon Vcan

46. Upon information and belief, USCIS's denial of Vcan's H-1B petitions was influenced by the Defendants bias against U.S. employers seeking to employ foreign nationals in the nonimmigrant "H-1B" visa category.

47. On April 18, 2017, for example, President Donald Trump signed an executive order entitled "Presidential Executive Order on Buy American and Hire American." Exec. Order No.

13,788, 82 Fed. Reg. 18837 (Apr. 18, 2017). The executive order established, by Presidential proclamation, that "it shall be the policy of the executive branch [including the Defendants] to … hire American." *Id.* § 2. The "Hire American" provisions of the executive order directed the Defendants to "rigorously enforce and administer the laws governing entry into the United States of workers from abroad" and required that DHS "… suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries. *Id.* §§ 2, 5.

48. Defendants' response to the executive order has been swift and tide-changing.

49. Between January 1, 2017 and August 31, 2017, for instance, Reuters reported a forty-five percent (45%) increase in the number of RFEs issued to U.S. employers who filed H-1B petitions compared with the same period in the previous year. *See* Yeganeh Torbati, *Trump administration red tape tangles up H-1B visa for skilled foreigners, data shows, Reuters* (Sept. 20, 2017), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1615-AC13.

50. According to the National Foundation for American Policy, those RFEs led to increased H-1B petition denials, rising forty-one percent (41%) between the third and fourth quarters of fiscal year 2017. *See* National Foundation for American Policy, *H-1B Denials and Requests for Evidence Increase Under Trump Administration* 1, 4-5 (Jul. 2018), https://nfap.com/wp-content/uploads/2018/07/H-1B-Denial-and-RFE-Increase.NFAP-Policy-Brief.July-2018.pdf.

51. The Defendants' intent to curtail U.S. employer's from sponsoring foreign nationals for nonimmigrant "H-1B" status is plain. In its 2018 regulatory agenda, for instance, DHS has previewed its intent to "revise the definition of specialty occupation" through its 2018 regulatory agenda. *See* Office of Management and Budget, "Strengthening the H-1B

Nonimmigrant Visa Classification Program" (Fall 2018), https://www.reginfo.gov/public/do/eAgendaViewRule? pubId=201810&RIN=1615-AC13.

52. The practical effect of the Executive Order has been the unstated imposition of a higher burden of proof, such as "clear or convincing" or "beyond a reasonable doubt," on U.S. employers seeking to sponsor foreign nationals in nonimmigrant "H-1B" status. This clear contravention of established precedent, *see Matter of Chawathe*, 25 I&N Dec. at 375-76, absent required rulemaking, is a clear legal error which has prejudiced Vcan and led to USCIS' decisions to deny the H-1B petition.

COUNT ONE
Violation of the Administrative Procedure Act
5 U.S.C. § 701, *et seq.*

53. Vcan re-alleges and incorporates herein by reference, as if fully set forth herein, the allegations in paragraphs 1-52 above.

54. Vcan is entitled to review by this Court pursuant to 5 U.S.C. §§ 701-706.

55. A reviewing court shall "hold unlawful and set aside agency action . . . found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

56. Defendants denied the H-1B petitions solely on the ground that the evidence in the record was insufficient to establish that Vcan's Financial Analyst position is in a specialty occupation.

57. Vcan submitted evidence demonstrating that the proffered position satisfied at least three of the four alternative regulatory criteria for demonstrating a "specialty occupation." 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) - (4).

56. Defendants failed to properly consider all record evidence; reached factual conclusions unsupported by any evidence in the record; misread the OOH; misconstrued the governing regulations; applied a heightened burden of proof; and erroneously concluded that Vcan had not demonstrated that the Financial Analyst position fell within the regulatory definition of a "specialty occupation."

57. Defendants' decisions to deny the H-1B petitions filed for the benefit of Junhua Wu and Jia Yan Hao constitutes agency action which is arbitrary, capricious and otherwise not in accordance the law in violation of the APA. 5 U.S.C. § 706(2)(A).

58. As the Defendants applied the incorrect burden of proof in its adjudication of Vcan's H-1B petitions—constituting an error of law—the Court should review this appeal *de novo*. *See* 5 U.S.C. § 706(2)(F),

PRAYER FOR RELIEF

WHEREFORE, Vcan requests that this Court:

A. Declare that Defendants' determination that Vcan's Financial Analyst position does not meet the definition of a specialty occupation was arbitrary and capricious, an abuse of discretion, and not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A);

B. Vacate the denial of the H-1B petitions for Junhua Wu and Jia Yan Hao and remand this matter to Defendants with instructions to approve the Forms I-129, Petition for Nonimmigrant Worker, filed by Vcan within ten days of the date of the Court's Order;

C. Award Plaintiff its costs in this action under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) and 5 U.S.C. § 504 *et seq.*; and

D. Grant such other relief as the Court deems just, equitable and proper.

Respectfully submitted,

VCAN BIO USA CO., LTD.

By its Attorneys,

NIXON PEABODY LLP

Dated: January 28, 2019

/s/ Nathan P. Warecki

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